Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS

The Coalition of Concerned Wireless Cable Operators (the "Coalition"),[1] by counsel and pursuant to Section 1.415 of the Commission's Rules and Notice of Proposed Rule Making, MM Docket No. 92-265, FCC 92-543, released December 24, 1992 ("Notice"), hereby submits these Comments in connection with the Commission's implementation of the program access and carriage agreement provisions of the Sections 628 and 616 of Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").

The Coalition consists of wireless cable operators that require access to programming on fair and non-discriminatory terms in order to compete effectively and offer the consumer a real

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[1] The Coalition consists of wireless cable operators that currently operate or are developing wireless cable systems, as follows: ACS Enterprises, Inc. (Philadelphia, PA), Broadcast Services International, Inc. (Ely, Minnesota), Countryside TV Management Services, Inc. (Caney, Kansas), Family Entertainment Network, Inc. (Fargo, North Dakota; Windom, Minnesota; and Yankton, South Dakota), People's Cable, Inc. (Lakeland, Florida), Rapid Choice TV, Inc. (Rapid City, South Dakota), Salisbury E MPSG (Salisbury, Maryland), and Skyline Entertainment Network (Spokane) L.P. (Spokane, Washington).

choice. It is axiomatic by now that consumers purchase programming, not technologies. The competitive promise offered by wireless cable (and other technologies) will not be fully realized and Congressional intent will be undermined in the absence of effective rules ensuring access to programming.

CABLE OPERATORS MUST NOT BE ALLOWED TO EXERCISE UNDUE INFLUENCE OVER PROGRAM SUPPLIERS

Section 628(b) makes it unlawful for a "cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" to engage in "unfair methods of competition or unfair or deceptive acts or practices" whose purpose or effect is to "hinder significantly" or to "prevent" delivery of programming by multichannel video programming distributors, such as wireless cable operators. This section, unlike other sections of the Act (e.g., Sections 628(c)(2)(A), (B), (C) and (D)), is broadly written to capture within its prescripts all "cable operators", regardless of whether they are vertically integrated with program suppliers.

Competition to cable -- from whatever source -- cannot thrive without access to programming. It is immaterial to those seeking access whether a cable operator has an "attributable interest" in a program supplier. The key is whether access has been effectively denied. The ability of a cable operator to influence a program supplier's decision to make its product available is primarily a function of size. The larger the operator, the greater "influence" that operator likely will wield. Thus, rules must be crafted to ensure that no cable operator is permitted to establish any

condition in its dealings with program suppliers that would have the effect of denying access to programming to a potential competitor in the market. The Coalition would exclude from this prohibition any locally-originated programming.

NO DISCRIMINATION IN THE PRICE, TERMS OR CONDITIONS OF THE SALE AND DELIVERY OF PROGRAMMING SHOULD BE TOLERATED

The right of wireless cable operators and others to enjoy access to programming must not be undermined by unreasonable charges or other terms and conditions. The great fear of many wireless cable operators is that creditworthiness and other factors will be used as codified excuses for refusing to deal. This must not be tolerated by the FCC.

The incremental costs associated with making programming available to wireless cable operators is not substantial. Program suppliers have already purchased satellite time, program rights, billing systems, etc. Program suppliers should be motivated to make their product widely available. Unfortunately, some program suppliers have made general conclusions about the creditworthiness of the wireless cable industry as a whole and, for example, charge higher rates to wireless cable operators for programming even where the same wireless cable operator is also a cable operator in the same area.[2] Thus, it will be necessary for the FCC to closely scrutinize any decision to deny access (or to charge higher fees, etc.) to ensure that the decision is firmly grounded in legitimate

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[2] The specific price differential cannot be disclosed because it would violate provisions in the contract.

business reasons.

EXCLUSIVE PROGRAMMING AGREEMENTS SHOULD BE PROHIBITED

Section 628(c)(2)(C) makes exclusive contracts per se improper in areas not served by a cable operator. Section 628(c)(2)(D) provides that unless the public interest would be served, cable operators are prohibited from securing exclusive programming rights even in areas that they serve.

For purposes of the Commission's Rules, "area" should be defined as the area in which subscribers can be connected to the system, wired or wireless. This definition helps ensure that the distinguishing factor is whether a subscriber could be served if it desired. This is necessary because of subscriber churn.

Various types of other contractual mechanisms also must be prohibited. These would include requirements that the wireless cable operator not air certain programming until a specified time after that programming has been aired by the local cable operator, prohibitions that a programming vendor may not provide programming within a wired operator's service area or provisions which require that contracts be renegotiated after the operator reaches a certain subscriber penetration level. These types of arrangements have at least as great a potential to stymie competition as do exclusive arrangements, and must be prohibited.

ENFORCEMENT PROVISIONS MUST BE STREAMLINED

If the rules adopted by the Commission are to have any meaning, a formal complaint process must be established that

results in an expedited resolution of any complaints. Toward that end, the Coalition supports adoption of a complaint and response pleading cycle with no opportunity for a reply. The complaint would be required to include specific factual evidence supported by affidavits from knowledgeable persons.

Once the staff has reviewed the complaint to determine if a prima facie case has been established, a status conference should be convened to determine if the parties can resolve the matter privately.

In determining whether a prima facie case has been made, the Commission should establish a presumption of discrimination where programming has been denied outright to a wireless cable operator or the wireless cable operator is paying a higher fee for the programming than other similar-sized operators.

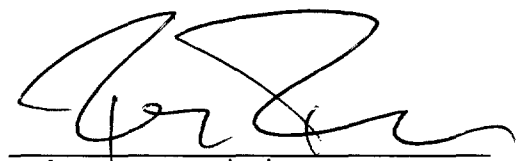
In order to make this system effective, program suppliers should be required to file data with the Commission indicating their rates and charges, and how those rates and charges are affected by factors such as system size. This data would be available for public inspection. Moreover, the data could form the basis for an annual report to Congress on the state of competition.

CONCLUSION

The Commission must act decisively to ensure that the promise of fair competition held out by Congress is fulfilled. Programming must be made universally available on a technology-neutral basis. A streamlined process must be established to ensure these rights can be enforced effectively.

Respectfully submitted,

THE COALITION OF CONCERNED WIRELESS CABLE OPERATORS

Dated: January 25, 1993 By: 

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